



## Council for Endangered Species Act Reliability

January 28, 2011

**CESAR**

**VIA EMAIL AND REGULAR MAIL**

Phil Isenberg, Chair  
Delta Stewardship Council  
980 Ninth St., Suite 1500  
Sacramento, California 95814

Ms. Terry Macaulay  
**email:** [deltaplanscoping@deltacouncil.ca.gov](mailto:deltaplanscoping@deltacouncil.ca.gov)

**Re: The Council for Endangered Species Act Reliability ("CESAR")  
Comments on the Delta Stewardship Council Notice Of Preparation  
For Draft Environmental Impact Report For The Delta Plan**

Dear Mr. Isenberg, Council Members, and Ms. Macaulay:

The Council For Endangered Species Act Reliability "CESAR" is a California nonprofit, public interest organization whose mission is to bring scientific rigor to regulatory decisions undertaken pursuant to environmental statutes, particularly the Endangered Species Act ("ESA") (16 U.S.C. § 1531, *et seq.*); California Endangered Species Act (codified at Fish and Game Code, §§ 2050, *et seq.*), to ensure consistent application of these statutes throughout all industries and all sectors, and to fulfill the educational goals of its members and provide educational information on the federal and state endangered species statutes and their application to the general public in the process. CESAR has an interest in calling attention to over-reaching regulatory actions taken during environmental reviews, without authority or basis, and the impacts when such actions threaten our quality of life.

Cesar thanks you for this opportunity and provides the following general comments on the Delta Plan:

- a. It must be consistent with water rights protections set forth in the California Constitution;

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- b. It must consider the social and economic impacts of the proposed project/alternatives upstream and downstream of the Delta;
- c. It must evaluate the comparative beneficial use of water for in-Delta fish flows, which are a consumptive use as they are lost to any other beneficial uses once they flow into the ocean, and the beneficial use of water for farming, which provides multiple recycled, recovered and reused benefits;
- d. It must evaluate and quantify the benefits of each use based on measurable results of the use.

**Specific Points re: Planning Goals and Objectives:**

- 1. Allow for projects to proceed that restore and protect water supply, water quality, and ecosystem health within a stable regulatory framework.**

**COMMENTS**

- a. The regulatory framework must take into account the history of the Delta in the context of not just human activities, as acknowledged under “Ecological Conditions”, but also in the much broader context of ever evolving and dynamic natural processes;
- b. The Delta Plan currently acknowledges that the system is “highly managed”, but it must also recognize that such management must continue since “natural” or “pre-project flow patterns” cannot meet the current demand for water, salinity levels, or flood control;
- c. The Delta Plan must acknowledge it is not physically possible to recreate or mimic “pre-project” or “pre-development” conditions due to myriad natural factors, such as subsidence, invasive species and climate change.

Average annual precipitation in the state is a meager 24 inches, ranging from as little as zero in the southern desert regions to as much as 100 inches in the mountainous north coast regions. The overall runoff in the state varies from year to year, for example, with a low of 15 million acre-feet in 1977 and a high of 135 million acre-feet in 1983. Sixty percent of the state’s precipitation is transpired by trees and other vegetation. Half of the approximately 71 million acre-feet of water left ends up as runoff that gathers in streams and other watercourses and flows through the Delta.

Due to the need to prevent seasonal flooding that caused serious damage to farms and cities along the Sacramento and San Joaquin Rivers and to ensure a reliable water supply for various water users, the federal Central Valley Project (“CVP”) was built beginning in 1937, with the first water deliveries in 1940. Later, in order to address the need to redistribute water supply from areas of surplus to areas of deficiency, the State Water Project (“SWP”) was built beginning in 1967, with first water deliveries in 1971.

The ecology of the Bay-Delta is continually evolving and changing as it has been since its discovery. There are a number of factors affecting the wildlife and fishery habitat and the

quality of drinking water and other water supply needs for consumption by residential, farming and municipal and industrial users. These factors are broadly acknowledged and include both natural phenomena, e.g., organic carbon, saltwater intrusion, disease, and predation; and human activities, e.g., waste discharges, introduction of invasive species, unscreened diversions, overfishing of some species, fish barriers, and channel alterations, among other things. Government agencies have convened a number of fora and attempted various woefully ineffective efforts to address the current conditions in the ecology of the Delta with the consequent ESA listing of the delta smelt, among other species (*e.g.*, salt marsh harvest mouse, valley elderberry longhorn beetle, and various salmonid species).

- 2. Provide a means to implement covered activities in a manner that complies with applicable state and federal fish and wildlife protection laws, including CESA and ESA, and other environmental laws, including CEQA and NEPA.**

#### **COMMENTS**

The Delta Plan must recognize that federal laws, such as the ESA and the Clean Water Act, can force changes in management regardless of the contents of the plan.

- 3. Provide a less costly, more efficient project review process which results in greater conservation values than project-by-project, species-by-species review.**

#### **COMMENTS**

CESAR believes that conservation of habitat is vitally important to successful recovery and delisting of species. The Delta Plan should focus its efforts on creating and preserving the ability to prioritize project activities in a way that will direct resources to actions that would provide the greatest conservation benefits to those species most in need of attention biologically based on the best available scientific data. Also, conserving species before they need protection under the ESA is often easier, more efficient, and poses fewer challenges to federal agencies.

- 4. Provide clear expectations and regulatory assurances regarding covered activities occurring within the Planning Area.**

#### **COMMENTS**

The Delta Plan must be refined to recognize that “protecting, restoring, enhancing, and managing natural communities” must be consistent with statutory regulatory assurances requirements, particularly under the ESA. In 1994, the government announced the “No Surprises” policy, which required federal agencies approving Incidental Take Permits (“ITP”) to provide landowners with “assurances” that, once an ITP was approved, even if circumstances subsequently changed in such a way as to render the federal equivalent of the Delta Plan (a Habitat Conservation Plan or “HCP”) inadequate to conserve listed species, the agencies would not impose additional conservation and mitigation requirements that would increase costs or further restrict the use of natural resources beyond the original plan. (*Spirit of the Sage*

Council v. Norton, 294 F. Supp. 2d, 67, 73-80). Despite numerous objections, the agencies promulgated a final No Surprises Rule, which essentially codified the No Surprises policy. *Id.* at 78. In order to encourage the use of ITPs, Congress directed the agencies to provide “adequate assurances ... to the financial and development communities that a section 10(a) permit can be made available for the life of the project.” (H.R. Conf. Rep. No. 97-835 at 30-31, 1982 U.S.C.C.A.N. 2871-72).

It is important to note in the Delta Plan with respect to ESA compliance, ITPs can be granted even if doing so threatens the recovery of a listed species. To the extent that there is a conflict between the general definition of “conservation” and the specific criteria in 16 U.S.C. § 1539(a)(2)(B), the “specific statutory language should control more general language when there is a conflict between the two.” (Nat’l Cable & Telecomm. Ass’n, Inc. v. Gulf Power Co., 534 U.S. 327, 335, 122 S.Ct. 782, 151 L.Ed.2d 794 (2002)).

Thank you again for providing the opportunity for public comments on this important matter.

Sincerely,

A handwritten signature in black ink that reads "Craig Manson". The signature is fluid and cursive, with the first name "Craig" being more prominent than the last name "Manson".

Craig Manson  
Executive Director  
Council for Endangered Species Act Reliability

CM/lrz